

REMARKS

Applicant expresses appreciation to the Examiner for consideration of the subject patent application. These remarks are in response to the Office Action mailed January 11, 2005.

Claims 1-21 were originally presented. Claims 1-21 remain pending in the application. Claims 1-21 were rejected under 35 U.S.C. Section 103 as obvious over the cited references and the “level of ordinary skill in the art” (page 4 lines 7,8 of outstanding Office Action).

This response is given along with filing a request for continued examination with a view to place the issues more in focus for consideration by the Examiner, and in the event the Examiner again rejects the application to place the application in better form for appeal.

The Examiner refused to consider the affidavits filed with the previous response, and has cited as reason that the affidavits are not appropriate when the reference is claiming the same patentable invention (page 2, numbered paragraph 1 lines 4, 5). The Examiner’s argument is not understood. The rejections were under section 103, and accordingly neither of the references cited sets forth the same invention as claimed in the present application (or a Section 102 rejection would have been properly given). Moreover, neither cited reference “is claiming the same patentable invention” (again p. 2 para. 1, lines 4,5) as the present application. Therefore, either way you try to interpret the language of the Office Action, the Examiner has not put forth a reasonable basis not to consider the affidavits as probative evidence on the issue of obviousness, the basis of rejection made by the Examiner.

Moreover, the citation of 37 CFR 1.131(a) and MPEP section 2306 is not understood, as the affidavits are not of the kind falling under these referenced sections, and are not given for the reasons set forth in section 1.131(a). Moreover, that Section was not cited as a basis for the

affidavits by Applicant. The Examiner has mischaracterized the nature of the affidavits, and for at least this reason has failed to consider them for reasons which appear unfounded. The Examiner's attention is respectfully directed to MPEP Section 716, where how these affidavits should be handled is set forth.

The Examiner has put forward a *prima facie* case for obviousness of the claims of the application over the cited references in this and previous Office Actions. Applicant then has a burden to show why the Examiner's case for obviousness does not stand, if applicant can do so. Applicant has invented something that in hindsight may appear obvious, but as to which secondary indicia of non-obviousness exist, and are amply borne out in the affidavits. Applicant has shown by the affidavits that there was a long-felt need for the invention (the relevant elements of the claims are set forth in the affidavits), which remained unfilled until Applicant's invention, and that once the invention was made it was immediately received and used in the art. More pointedly, the affidavits set forth that once introduced the invention was immediately copied by competitive entities. These competitive entities, by the way, include those of far larger size and resources (and which had the financial means to immediately provide the product and could have done so earlier if it was in fact obvious to do so). The success of the product in the marketplace is mentioned, and this is (unfortunately) most amply shown by sales of applicant's competitors, again who only began selling the product after introduction of the invention to the marketplace by applicant. Applicant does not have access to the sales figures of her competitors, but as indicated and supported by the affidavits the fact that numerous entities copied the invention after its market introduction by applicant speaks for itself. Applicant believes total sales by all competitors to be substantial. These facts are directly probative of non-obviousness,

and the affidavits are the most efficient way to place these facts before the office for consideration of the issue of obviousness.

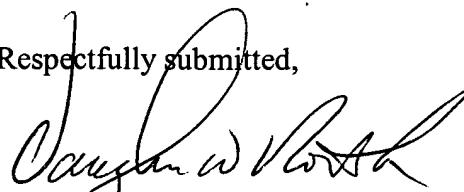
Moreover, these facts evidenced by the affidavits directly rebut the Examiner's case for obviousness. Accordingly, the rejections made, including those made in the present office action, cannot stand in light of the facts raised by Applicant. Failure to consider the affidavits was clear error, and Applicant requests reconsideration of the application and specifically the affidavits on the issue of obvious (not prior invention per 37 CFR 1.131(a)).

The rejections made in the present office action cannot stand for the reasons set forth above and in the previous response, which latter reasons are re-asserted here and incorporated herein by reference.

The Commissioner is hereby authorized to charge any additional fee or to credit any overpayment in connection with this Amendment to Deposit Account No. 20-0100.

DATED this 11th day of April, 2005.

Respectfully submitted,



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